

1 Mark R. Vermeulen [CSBN 115381]
2 Law Office of Mark R. Vermeulen
3 755 Florida Street #4
4 San Francisco, CA 94110-2044
5 Phone: 415.824.7533
6 Fax: 415.824.4833
7 vermeulen@mindspring.com

8 Attorney for Defendant
9 CHARLES HEARD

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12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

15 UNITED STATES OF AMERICA, No. 13-cr-00764-WHO
16 Plaintiff,
17 v.
18 CHARLES HEARD, et al.,
19 Defendants.

20 DEFENDANT CHARLES HEARD'S REPLY RE: JOINDER IN
21 CODEFENDANTS ADRIAN GORDON'S AND ESAU FERDINAND'S MOTIONS
22 TO EXCLUDE DNA TEST RESULTS AND REQUESTS FOR A DAUBERT
23 HEARING

24 In the Government's expert disclosures, they indicated that they would seek to introduce DNA
25 evidence against Defendant Heard at trial: two genetic marker profiles potentially related to Mr. Heard
26 which pertain to a mixture of several persons (at least three contributors for one potentially relevant
27 profile, and at least four contributors for the other). By the calculations of Serological Research Institute
28 (SERI), the laboratory that undertook the testing, the statistical likelihood that other persons similarly
could be included as contributors with respect to Mr. Heard means they are quite common:
approximately 1 person in 12,600 for one profile could similarly be included, and approximately 1
person in 20 for the other profile could similarly be included.

1 In light of the Government's stated intention, Mr. Heard joined in Codefendant Gordon's *Motion*
2 *to Exclude DNA Test Results and Request for Daubert Hearing* (Dkt. No. 639) and in Codefendant
3 Ferdinand's *Motion to Exclude Evidence From DNA Testing Performed by Serological Research*
4 *Institute and Request for Daubert Hearing* (Dkt. Nos. 648 and 649). *See* Mr. Heard's *Joinder in*
5 *Codefendant Adrian Gordon's Motion to Exclude DNA Test Results* (Dkt. No. 638; "Joinder in
6 *Gordon's DNA Motion"); Joinder in Codefendants' Motions* (Dkt. No. 683). As noted in the *Joinder in*
7 *Gordon's DNA Motion*, the DNA testing and analysis conducted in connection with Codefendant
8 Gordon involved low copy number (LCN) DNA or low template (LT) DNA, as did the DNA testing and
9 analysis pertinent to Mr. Heard. Dkt. No. 638 at 1:23-2:6. As such, many of the issues and principles
10 pertinent to the Court's analysis under Fed. R. Evid. 702 and *Daubert* will be applicable to the testing
11 regarding both of these defendants (even though two different labs were involved), such that a
12 coordinated *Daubert* hearing makes sense. And as noted briefly in Mr. Heard's joinder in Codefendant
13 Ferdinand's DNA/*Daubert* motion, Dkt. No. 683 at 2:1-3, the DNA testing performed that is pertinent to
14 Codefendant Ferdinand was performed by SERI, the same lab that performed the DNA testing pertinent
15 to Mr. Heard, so coordination similarly makes sense.

16 As counsel for Mr. Heard explained in the *Joinder in Gordon's DNA Motion*, counsel needed to
17 make further discovery requests for documents and information pertinent to SERI and its analysis
18 regarding Mr. Heard in order to litigate the DNA/*Daubert* issues. Dkt. No. 638 at 2:7-3:10. Counsel for
19 Mr. Heard presented those requests to the Government early in December, and the parties met and
20 conferred earlier this week (in addition to the meet-and-confer they undertook in November; *see* Dkt.
21 No. 638 at 2:26-28). At the recent meet-and-confer, the Government indicated that the requests should
22 be directed to SERI itself, and counsel for Mr. Heard therefore is preparing the necessary application for
23 a subpoena duces tecum for the documents and information, which he will submit to the Court next
24 week. Counsel for Codefendant Ferdinand (whose DNA testing also was conducted by SERI) will be
25 joining in that application and the requests, as the documents and information similarly are pertinent to
26 him.

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1 The items requested by Mr. Heard (which he will now subpoena from SERI) include laboratory
2 protocols, frequency tables and interpretation guidelines; unexpected results and corrective actions;
3 accreditation documentation; and validation studies, including validation studies for sensitivity,
4 analytical and stochastic thresholds used by the laboratory in their standard operating procedures,
5 mixtures, and statistics calculations. These items are the same as many of the items relevant to
6 Codefendant Gordon's *Motion* (Dkt. No. 639), and the issues addressed very specifically in Codefendant
7 Gordon's *Reply Memorandum* (Dkt. No. 794). These items are essential for the Court to be able to
8 address the LCN DNA analysis pertinent to Mr. Heard under the principles set forth in *United States v.*
9 *McCluskey*, 954 F.Supp.2d 1224 (D.N.M. 2013) and related authority, as discussed in Codefendant
10 Gordon's briefing.

In light of the above, counsel for Mr. Heard currently is not able to provide a substantive reply in support of his joinders in the DNA/*Daubert* motions and he will not be able to do so until he obtains the necessary documentation and information, analyzes it, and submits further briefing. In light of the Court's recent indications regarding timing and rescheduling in the case, further time seems feasible in order to enable the parties and the Court to appropriately address the DNA/*Daubert* issues,¹ and counsel requests that the Court permit counsel to obtain the necessary documents and to undertake the necessary work.

18 | Dated: January 8, 2016

Respectfully submitted,

/S/
Mark R. Vermeulen
Attorney for Defendant
CHARLES HEARD

²⁵ Counsel also notes the Court's recent indication in the *Order Regarding Discovery Motions Heard on December 17, 2015* (Dkt. No. 758) at 5:23-25 regarding Codefendant Gordon's motion for discovery of further DNA related materials, in which the Court addressed "the summary spreadsheets and chart, data and interpretational notes" for six of the twelve summaries provided and stated "I [the Court] note that Gordon has a pending *Daubert* motion on January 22, 2016 that may shed further light on the importance of the documents he seeks, and if they appear material I may require their production in the interest of justice."
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